

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

)

) Div. 6

)

) **DEFENDANT'S BENCH**

) **MEMORANDUM ON**

) **PROCEDURES FOR**

) **DETERMINING IF AN**

) **UNWAIVABLE CONFLICT**

) **EXISTS**

)

) **UNDER SEAL**

Steven DeMocker, by and through counsel, hereby respectfully provides this Court with a bench memorandum regarding procedures to be followed to determine whether or not a conflict exists given the State's actions and accusations against defense counsel. This memorandum is based on the Fifth, Sixth, Eighth and Fourteenth Amendments and the Due Process Clause, and Arizona counterparts, the Arizona Rules

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DIVISION 6

1 of Evidence, the Rules of Professional Conduct and the Arizona Rules of Criminal
2 Procedure.

3 **BACKGROUND**

4 Attorneys John Sears, Larry Hammond and Anne Chapman have been
5 representing Mr. DeMocker since he was charged in October of 2008.¹ Jury
6 selection began on May 4, 2010 – more than three months ago. Opening
7 statements in the case commenced on June 3, 2010. On June 17, trial was
8 suspended based on Judge Lindberg's sudden health crisis. Judge Darrow was
9 appointed to the case on July 2. Trial resumed on July 21.

10 On July 9 after Judge Darrow took over the case but before trial resumed, the
11 State indicated it intended to call Mr. DeMocker's counsel, John Sears, to testify about
12 the disposition of the Hartford Life Insurance policies. On July 12, the State filed under
13 seal a Motion for Determination of Counsel with Chronology of Events and Exhibits.²
14 On July 14, the Court held a sealed hearing and denied the State's Motion contingent
15 upon answers to four questions posed to the defense.

16 At the July 14 hearing, the Court asked the State to present its evidence of
17 misconduct. The State had a full opportunity to proffer information and offer argument.
18 The State also filed a chronology of its accusations along with allegedly supporting
19 documentation. The Court found that an evidentiary hearing was not required³ and
20 concluded that, based on everything presented by the State, there "has not been a
21 showing sufficient to this Court suggesting a reason for why this defense team can't
22 continue in this manner." (July 16 Transcript, Under Seal, 6:3-5.) On July 15, the
23 defense answered the Court's questions and indicated they could proceed if the false
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25 ¹ Mr. Sears' representation of Mr. DeMocker began in July of 2008.

26 ² At the same time, the State filed copies of these pleadings in the Superior Court probate case assigned to Judge Mackey, as attachments to a document styled "Notice of Irregularities".

27 ³ The Court advised the parties to have witnesses it intended to call prepared to testify on July 14. The State indicated it had a single officer witness prepared to offer testimony.

1 accusations of the State were no longer raised in the case. On July 16, the Court held
2 that "... this trial would not involve accusations in any fashion of wrongdoing by the
3 defense team. It is not. That, in itself, eliminates a lot of the records right there." (July
4 16, 2010 Sealed Transcript 6:6-9). The Probate Court also promptly dismissed the
5 State's "Notice of Irregularities" related to these same allegations. The only open issue
6 with respect to the Hartford Life Insurance policies after July 16 was the issue of what
7 would be admissible regarding Mr. DeMocker's "disclaimer" of benefits. Trial resumed
8 on July 21, on these understandings.

9 Two months after the State claimed it first learned the Hartford Life Insurance
10 proceeds had been paid to Katie and Charlotte DeMocker, and almost two weeks after
11 trial resumed, the State filed two disturbing pleadings at 5:00 p.m. on August 2. These
12 pleadings, for the first time, made the shocking announcement that "[w]ith regard to [REDACTED]
13 [REDACTED]
14 [REDACTED] (State's Response to Defendant's
15 Motion to Dismiss, pg. 3; emphasis added). Further, in a separate "Motion for
16 Protective Order," the State attempted to withhold documents and interviews from the
17 defense, claiming that the information was also relevant "in the tangential criminal
18 investigation" of the disposition of the Hartford Life Insurance proceeds. Through these
19 pleadings, the Court and the defense learned for the first time that the State [REDACTED]
20 [REDACTED] and that it had initiated a criminal investigation
21 [REDACTED]
22 [REDACTED]

23 At an under seal, in-chambers hearing on August 3, the Court denied the
24 State's Motion for a Protective Order and ordered the documents and interviews
25 disclosed. The State indicated at this hearing that it had stayed the criminal
26 investigation of counsel and that the matter would be referred outside of Yavapai
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1 County for any additional investigation and charging decisions.⁴ The State also
2 announced that [REDACTED]
3 The Court explained that the defense had made clear in earlier proceedings that
4 their ability to proceed as counsel “really had to be with the understanding that
5 they would not be defending themselves, if you will, in something that involves
6 their client.” (August 3 Transcript, Under Seal, 17:2-6). As a result, the jury was
7 dismissed for the week and told to check in on Tuesday, August 10, to see if trial
8 would resume on August 11.

9 Another under seal hearing was held on August 4. At that hearing the
10 State said again that it would be [REDACTED]. The State
11 also reconfirmed the existence of a related criminal investigation, and advised
12 that it was being stayed. The Court ordered the State, over its objection, to
13 provide the defense with a copy of [REDACTED]. The defense received [REDACTED]
14 [REDACTED] in the early evening hours of August 4, 2010. The [REDACTED]
15 [REDACTED], including
16 virtually the same chronology and documents that were presented to this Court at
17 that time.

18 **I. The Sixth Amendment Inquiry Requirement**

19 The right to counsel under the Sixth Amendment entails “a correlative
20 right to representation that is free from conflicts of interest.” *Wood v. Georgia*,
21 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981) (citing *Cuyler*
22 *v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and *Holloway*
23 *v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). A defendant
24 suffers ineffective assistance of counsel in violation of the Sixth Amendment if
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26 ⁴ Although this assertion was made in court by the State on both August 3 and 4, the State then refused on August
27 4 to put this avowal in writing.

1 his attorney has (1) a potential conflict of interest that resulted in prejudice to the
2 defendant, or (2) an actual conflict of interest that adversely affected the
3 attorney's performance. *See Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir.1993)
4 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
5 (1984)); *United States v. Fulton*, 5 F.3d 605, 609 (2d Cir.1993).

6 As noted in the defendant's response to the State's Motion for
7 Determination of Counsel, the court has an obligation to inquire if an allegation
8 of a conflict of interest is made. *See Wood*, 450 U.S. at 272-73, 101 S.Ct. at
9 1103-04; *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway*, 435 U.S. at
10 484, 98 S.Ct. at 1178-79. The court must investigate the facts and details of the
11 attorney's interests to determine whether the attorney in fact suffers from an
12 actual conflict, a potential conflict, or no genuine conflict at all. *See Strouse v.*
13 *Leonardo*, 928 F.2d 548, 555 (2d Cir.1991) ("In order to protect a defendant's
14 right to conflict-free counsel, the trial court must initiate an inquiry when it
15 knows or reasonably should know of the possibility of a conflict of interest.");
16 *see also United States v. Aiello*, 814 F.2d 109, 113 (2d Cir.1987) (Sixth
17 Amendment "imposes a duty upon a trial court to inquire").

18 **II. The Court Met the Sixth Amendment Inquiry Requirement and** 19 **Determined that No Conflict Exists**

20 This Court held a hearing where it heard the evidence from the State as to
21 its allegations of a conflict. Hearing all of the State's evidence and argument, the
22 Court did not find an actual or potential conflict. The Court's obligations have
23 therefore been met under the Sixth Amendment. In *United States v. Levy*, the
24 Court held that the trial court met its inquiry obligation where the Court "did not
25 ignore the conflict issues once they came to the Court's attention" and conducted
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1 extended colloquies about the asserted conflicts. *United States v. Levy*, 25 F.3d
2 146, 154 (2^d Cir. 1994).

3 If the Court finds, after such an inquiry, that an actual or potential conflict
4 exists, the Court has an additional obligation to inform the defendant of the
5 conflict and the possible consequences and potentially to consider a waiver by
6 the defendant of the conflict, if the conflict is of the type that can be waived.
7 However, where the Court finds, as it did here, that no such conflict exists, the
8 Court's obligations are met and no further action is required. As the Court in
9 *Levy* held, where the inquiry satisfies the Court, as it did here, that there is no
10 genuine conflict, "*the court has no further obligation.*" *Id.* at 153 (emphasis
11 added). The Court's inquiry and findings from July 14 and 16 meet the burden
12 of inquiry under the Sixth Amendment.

13
14 **III. The Court Found, After Inquiry, That No Conflict Exists and
Therefore No Waiver is Required**

15 During hearings on July 14 and 16, this Court conducted an inquiry based
16 on the State's allegations of a conflict of interest. The Court offered the State the
17 opportunity to proffer evidence and reviewed the voluminous documents and
18 chronology provided by the State. The Court found, after this hearing, that there
19 "has not been a showing sufficient to this Court suggesting a reason for why this
20 defense team can't continue in this manner." (July 16 Transcript, Under Seal,
21 6:3-5.) The State's allegations on July 14 and 16 are no different than those it is
22 making now [REDACTED]. The State provided the same documents and
23 substantially the same chronology [REDACTED] as had been provided to this Court.

24 Government allegations of wrongdoing against defense counsel alone
25 cannot rise to the level of an actual conflict unless the charges have some
26 foundation. *See e.g. United States v. Jones*, 900 F.2d 512, 519 (2d Cir. 1990)

1 citing *United States v. Osorio Estrada*, 751 F.2d 128, 132 (2d Cir.1984), *aff'd on*
2 *reh'g*, 757 F.2d 27, 29 (2d Cir.), *cert. denied*, 474 U.S. 830, 106 S.Ct. 97, 88
3 L.Ed.2d 79 (1985). In the *Jones* case, the Court held that where the government
4 raised ethical considerations concerning defense counsel's representation and
5 cited specific disciplinary rules from the Model Code of Professional
6 Responsibility concerning an attorney's duty not to suborn perjury, there was no
7 conflict of interest where the allegations were not supported by credible
8 evidence. *Id.* Likewise, in *Wheat*, the Supreme Court noted that a court must
9 consider the State's motive to falsely create a conflict to avoid moving ahead
10 with a trial and interfere with a defendant's right to counsel. *See Wheat v. United*
11 *States*, 486 U.S. 153, 160 (1988). The *Wheat* Court observed that the Petitioner
12 "of course rightly points out that the Government may seek to 'manufacture' a
13 conflict in order to prevent a defendant from having a particularly able defense
14 counsel at his side; but trial courts are undoubtedly aware of this possibility, and
15 must take it into consideration along with all of the other factors which inform
16 this sort of a decision." *Id.* at 163.

17 While some cases of false allegations may create a conflict requiring
18 waiver where the false allegation might limit an attorney's ability to cross-
19 examine a witness, *cf. United States v. Fulton*, here no such conflict exists
20 because this Court has determined that the manner in which the Hartford Life
21 Insurance benefits were obtained and paid is not relevant or admissible at trial.
22 *See e.g. United States v. Fulton*, 5 F.3d 605, 613 (2d Cir. 1993).

23 After hearing the State's allegations in July, repeated again in August, this
24 Court advised the State that "I know what your chronology says and that adds up,
25 to me, as some kind of a potential civil dispute over the trust and what
26 beneficiaries can do and what they want to do and what trustees can do. The
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1 kind of thing you can probably find a lot of trust litigation on. But in my
2 experience, in the criminal justice system I have never seen a case such as that.”
3 (August 4 Transcript, Under Seal, pg. 10:24-11:5). Remarkably, after making
4 defamatory, unsubstantiated and shocking allegations against defense counsel for
5 a month now, the State agreed, via Deputy County Attorney Joe Butner, “I,
6 personally, am not familiar with any kind of a criminal case in that regard.” (*Id.*
7 18:5-6). The State also admitted at the hearing on August 4 that Hartford
8 Insurance Company has not shown any interest or concern about the payment of
9 the proceeds as alleged by the State. *Id.* 23:1-4. As the Court knows, separate
10 and independent trust and insurance counsel were involved throughout.

11 The State has been aware of and allegedly investigating the Hartford
12 Insurance benefit payments for two months now. The Court repeatedly advised
13 the State on August 4 that it had not made any showing of any criminal conduct,
14 “There seems to be no basis, Mr. Butner, of your claiming there is some type of
15 theft.” *Id.* 52:15-16. As the Court advised the State on August 4, “[i]t’s not
16 readily apparent to me, as you know, from looking at the chronology and backup
17 documents, which I don’t think anyone is contesting—it’s not immediately
18 apparent to me, at all that there is some type of illegal conduct there.” *Id.* 52:20-
19 24.

20 The Court directed that any documentation that was the basis for the
21 allegations of wrongdoing be provided to the defense on August 4. That evening
22 the defense received a copy of [REDACTED] which contains the same
23 allegations, attaches the same documents and provides substantially the same
24 chronology as has been previously provided to this Court.⁵ There simply is no
25 substantiation for the State’s allegations. The Court has already noted that on the
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27 ⁵ The State attached an undated, unsworn and unsigned “letter” from James Musgrove to [REDACTED].

1 basis of the State's information, "I don't see any basis for the allegations... ." *Id.*
2 54:13-14.

3 **IV. [REDACTED] and Criminal Investigation, if Stayed Pending**
4 **Trial, Do Not Present a Conflict; If the Court Finds Either Does**
5 **Create a Conflict, the Charges against Mr. DeMocker Should be**
6 **Dismissed with Prejudice**

7 After the Court advised the State that it found no basis for the State's
8 claims to disqualify the defense team and after the defense team advised that its
9 ability to proceed depended on not being forced to defend themselves in charges
10 relating to their client, the State instigated a criminal proceeding and a mid-trial
11 [REDACTED]. This is the subject of the Defendant's Motion to Dismiss with
12 Prejudice. If the Court finds that either the criminal investigation or [REDACTED]
13 [REDACTED] do create an unwaivable conflict, the Court should dismiss the charges
14 with prejudice based on the State's intentional attempts to manufacture this
15 conflict and generate a mistrial.

16 Although the defense is aware of authority providing that a conflict exists
17 if an attorney is investigated for activities substantially related to the charges
18 against the defendant, (*see e.g. United States v. Pizzonia*, 415 F. Supp 2d 168
19 (E.D. NY 2006)), counsel do not believe that authority applies in this case for at
20 least three reasons: 1) the Court, after hearing the State's evidence, has found no
21 basis for the State's allegations of criminal wrongdoing; 2) the State has avowed
22 that the criminal investigation is stayed and will be referred outside of Yavapai
23 County⁶ and 3) the Court has determined that the evidence relating to the
24 disposition of the Hartford Life Insurance benefits for attorneys fees is not
25 relevant or admissible at trial, other than in a very limited way.

26
27 ⁶ The defense requests that this avowal be made in writing from Sheila Polk and believes such a letter would be
28 sufficient to avoid any actual or potential conflict during the pendency of trial, at least on this point.

1 Defense counsels' ethics attorney has made inquiry [REDACTED]
2 [REDACTED] Such a stay would likely eliminate
3 the possibility of an actual or potential conflict during trial. To the extent that the
4 mid-trial filing of [REDACTED] by the State creates a conflict, the State's
5 conduct was intentional, after being advised by the Court and counsel that such
6 an action would seriously jeopardize defense counsels' ability to proceed. The
7 State chose to move forward with filing [REDACTED], knowing
8 that such an act would potentially put Mr. DeMocker to the impossible choice of
9 proceeding with conflicted counsel or declaring a mistrial. This is particularly
10 true where, in the middle of trial the State continues to make these allegations
11 without any support or basis. As the Court noted on August 4, "instead of
12 getting ready for a noon recess at a trial, we are now here discussing legal issues
13 because of this assertion that there could be possibly an unwaivable conflict of
14 interest and you're not having the information that seems to readily support that."
15 (August 4, 2010 Transcript, Under Seal, pg. 54:20-24.) Later, the Court noted,
16 "... as the trial judge who is trying to conduct a trial, to get at this point without
17 having that all completely framed, I have a very difficult time understanding that.
18 The arguments should be there to get to this level of accusation, if you will." Id.
19 at 56:14-19. As argued elsewhere, counsel request the dismissal of charges
20 against Mr. DeMocker with prejudice based on the double jeopardy clause and
21 the State's misconduct. (See Defendant's Motion for Dismissal with Prejudice.)
22

23 **V. Conflict Issues With the Hartford Life Insurance Information at Trial**

24 The State's assertions that what was done with insurance proceeds after Mr.
25 DeMocker was arrested is relevant to Mr. DeMocker's motive is nonsense and has been
26 rejected by this Court. The Court has held that there has been no showing that the
27 relevance of the efforts to obtain the insurance proceeds for legal fees can override the
28

1 extraordinary danger of unfair prejudice. "[T]here may be cases where there is
2 relevance to the efforts to obtain monies to pay defense attorneys and pay for defense.
3 And there just is not that showing in this case, whatsoever, to make the relevance such
4 that the probative value would stand up against the very high danger of unfair prejudice,
5 based on the showing that I have here, and also the 404(b) aspects, as well. This is what
6 I have got right now." (July 16, 2010 Transcript Under Seal, 7:4-11). Furthermore, if
7 the State does believe that the payment of insurance proceeds for legal fees is relevant
8 to Mr. DeMocker's motive, its' simultaneous assertion that counsel proceed in the face
9 of this unwaivable conflict, as mentioned yesterday, strains credulity.

10 The Court has also already held that facts about how the insurance benefits were
11 ultimately transferred (through the estate, the trust, to Mr. DeMocker's daughters, to
12 Mr. DeMocker's parents and Mr. DeMocker's counsel), how much was transferred and
13 for what purpose the money was used is not relevant to any fact at issue in this trial. On
14 July 16, the Court held that "[a]nd that means that this trial would not involve
15 accusations in any fashion of wrongdoing by the defense team. It is not. That, in itself,
16 eliminates a lot of the records right there." (July 16, 2010 Sealed Transcript 6:6-9).
17 The Court noted that this decision was based on Rule 403 concerns and Rule 404(b)
18 concerns. "The danger of unfair prejudice is just extremely high to be discussing those
19 types of issues. And it does have a lot of similarities, or it is, essentially, in character
20 evidence that is prohibited by 404(b). And just looking at what is here objectively, an
21 attempt by someone who is charged with a capital offense to obtain money for legal
22 services, that's something that can be completely consistent with innocence. And the
23 fact that someone is charged with a capital offense precipitates, or can precipitate,
24 strong steps, focused steps to obtain the best defense a person can obtain." (July 16,
25 2010 Transcript, Under Seal, 6:14-7:1).

1 The Court left open the issue of the disclaimer of Hartford benefits and what
2 might be said about that. The defense does not believe any evidence related to this is
3 relevant or admissible but did propose that the defense would be willing to stipulate,
4 while preserving the stated objections, to the following conditional stipulation:
5

6 After Mr. DeMocker's arrest and after he was charged with the murder of Carol
7 Kennedy, Katie and Charlotte DeMocker, Mr. DeMocker's children contributed a
8 portion of the money they received from Hartford Insurance Company to the defense of
9 their father.

10 However, this stipulation could only be agreed to by the defense if the Court also
11 rules that the State and the defense cannot inquire into or argue about any of the
12 following areas: 1) the process of how the money was transferred from Hartford to the
13 daughters to Mr. DeMocker's counsel; 2) the amount of money contributed; and/or 3)
14 the amendment, settlement, appointment of trustees, substitution of trustees or any other
15 late disclosed issues related to the Estate and/or Trust of Carol Kennedy. As noted
16 earlier, two additional conditions are necessary. First the Court should affirm its prior
17 order that the State may not introduce any late disclosed documents or witnesses related
18 to the Hartford Insurance issues. Second, in anticipation of any juror questions on this
19 topic, the Court should order that the amount of money given for the defense of Mr.
20 DeMocker is irrelevant and that any juror inquiry should be stated so as to make clear
21 that any evidence relating to the transfer of funds from the girls to their father's lawyers
22 is inadmissible.

23 This stipulation addresses the Court's concern about what it means that Mr.
24 DeMocker disclaimed his interest in the Hartford Life insurance policies and the State's
25 allegation that it has a right to demonstrate that Mr. DeMocker benefited from the
26 payment of those policies.

27 The State continues to argue that Mr. DeMocker somehow had a "master plan"
28 and that he exercised dominion and control over the insurance money throughout. The

1 Court has stated that based on the evidence before it, any argument about dominion and
2 control would not be permitted, (August 4, 2010 Transcript, 77:21-78), and would
3 create a possible unwaivable conflict issue. *Id.* 81:17-20.

4 Counsel believe that the clearest possible guidance on this issue and the Court's
5 determination of what will and will not be admissible is the best way to avoid further
6 conflicts issues related to the payment of Hartford Insurance benefits. The rejection of
7 this issue as relevant and admissible at trial is part of what convinces the defense that no
8 conflict exists as a result of the State's false accusations. If this evidence is deemed to
9 be admissible, the defenses' ability to respond to these false accusations may create a
10 situation similar to that found in *Fulton*, where the court held that a conflict existed
11 based on a false allegation by a government witness because they lawyer cannot cross-
12 examine the witness regarding the false allegations. *United States v. Fulton*, 5 F.3d 605,
13 613 (2d Cir. 1993). Here the conflict would be more problematic because counsel will
14 likely need to be witnesses, thus raising the serious ER 3.7 issues we have discussed if
15 the State is permitted to introduce any evidence of its false allegations at trial. The
16 defense requests that the Court order that the defense stipulation and limitations on the
17 Hartford Insurance evidence as outlined above are the limits on the evidence and
18 arguments at trial.

19 CONCLUSION

20 Should our motion to dismiss be granted, none of this will be necessary, but if we
21 need do more, we suggest that this issue should be resolved as soon as possible so that
22 the jurors can be informed and can return on Wednesday, August 11, for the resumption
23 of the trial if it is to be resumed at all. We consider unthinkable the prospect that trial
24 might not resume next week and that a total of more than three weeks will then have
25 passed before the jury's scheduled return. The prejudice to Steve DeMocker is too
26 apparent to deserve debate.

1 DATED this 6th day of August, 2010.

2 OSBORN MALEDON, P.A.

3
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13 **ORIGINAL** of the foregoing hand delivered for
14 filing this 6th day of August, 2010, with:

15 Jeanne Hicks
16 Clerk of the Court
17 Yavapai County Superior Court
18 120 S. Cortez
19 Prescott, AZ 86303

20 **COPIES** of the foregoing hand delivered this
21 this 6th day of August, 2010, to:

22 The Hon. Warren R. Darrow
23 Judge Pro Tem B
24 120 S. Cortez
25 Prescott, AZ 86303

26 Joseph C. Butner, Esq.
27 Jeffrey Paupore, Esq.
28 Prescott Courthouse basket

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